DIMENSION OF JUSTICE IN RESTORATIVE JUSTICE PARADIGM IN THE CRIMINAL SYSTEM FOR SEXUAL VIOLENCE IN INDONESIA

ROZMER SPRAVODLIVOSTI V PARADIGME RESTORATÍVNEJ JUSTÍCIE V TRESTNOM SYSTÉME PRE SEXUÁLNE NÁSILIE V INDONÉZII

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I. Introduction

Principally, every state has their legal obligation to protect and promote the rights of people without any exception based on the constitution and principles of human rights. In ideology and constitution, nothing can take the rights of others, includes the rights of women and children⁽¹⁾. Thus, violence that occurs to women and children, especially sexual violence, is a violation of human rights, a violation of dignity and gender

discrimination that must be eliminated⁽²⁾.

Victims of various kinds of illegal behaviour from sexual harassment to sexual violence in general are women, children, and people with disabilities, as cultural stereotype in society⁽³⁾. Women and children as victims often experience more violence, both physical and mental, either at home and society⁽⁴⁾. The victims and their families experience prolonged suffering due to sexual violence, in form of trauma and de-

⁽¹⁾ Siregar (2018).

⁽²⁾ Makarao, Taufik, Bukamo and Azri (2013).

⁽³⁾ Achie Sudiarti Luhulima (2000).

⁽⁴⁾ Khanif (2019).

Abstract (EN)

The act of sexual violence is a crime that is classified as a violation of human rights (HAM). The increase number of sexual violence cases in the world, including Indonesia, shows that the current justice system is unable to guarantee justice for victims, and most importantly recovery for victims. For this reason, a justice restoration approach is needed as an alternative in law enforcement against sexual crimes. Practically, marriage used as a way to approach justice restoration. This article used normative and juridical approach to discuss law enforcement on sexual crimes through restorative justice approach. It can be concluded that law enforcement on sexual crimes should observe based on criminology, victimology and ontology aspects, in order to be able to place the problem objectively. As a complaint offense, sexual crimes may not be passed on to criminal process, if there is peace between the victim and the perpetrator, provided that there is an agreement among the victim, perpetrator, family and society without coercion from various parties. The main focus in restorative justice of sexual crimes is to provide protection and assistance to victims from various parties, thus, the victims can be released from trauma or psychological impact that caused by sexual violence experienced by the victim or the impact received after the occurrence of sexual crime.

Keywords (EN)

restorative justice, sexual violence, victim protection, victim assistance

Abstrakt (SK)

Sexuálne násilie je trestný čin, ktorý sa klasifikuje ako porušovanie ľudských práv. Nárast prípadov sexuálneho násillia vo svete, vrátane Indonézie, dokazuje, že súčasný súdny systém nie je schopný zaručiť spravodlivosť pre obeť, a čo je dôležitejšie ani zotavenie obeť. Z tohto dôvodu je ako alternatíva v presadzovaní práva proti sexuálnym trestným činom potrebná restoratívna justícia. V praxi sa ako spôsob obnovenia spravodlivosti používa manželstvo. Tento článok využíva normatívny a právny pohľad v diskusii o presadzovaní práva v oblasti sexuálnych trestných činov prostredníctvom prístupu restoratívnej justície. Možno konštatovať, že pri presadzovaní práva v oblasti sexuálnych trestných činov na to, aby bolo možné problém objektívne vyhodnotiť, je potrebné skúmať kriminologické, viktimologické a ontologické aspekty. Sexuálne trestné činy nemožno preniesť do trestného konania, ak medzi obeťou a páchatelom panuje mier, čím sa myslí, že dôjde k dohode medzi obeťou, páchatelom, rodinou a komunitou bez nátlaku z nejakej strany. Dôležitým aspektom v prípade restoratívnej justície pri sexuálnych trestných činoch je poskytnúť obeť ochranu a pomoc, aby bolo možné im uľaviť od traumy alebo psychologických následkov spôsobených sexuálnym násillím, alebo následkov po sexuálnom zločine.

Kľúčové slová (SK)

restoratívna justícia, sexuálne násilie, ochrana obeť, pomoc obeť

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pression⁽⁵⁾. Approximately the third of all cases of sexual violence are perpetrated at home, committed by closest people to the victim, such as family members or friends, and often caused other victimization. One of the reasons could be a fact of criminal law enforcement system, especially prevention of sexual-related offenses, is still weak. Generally, sexual violence is revealed when the victim files a criminal complaint, or the victim's family reports sexual harassment. However, the absence of prevention efforts and the absence of severe sanctions for perpetrators of sexual harassment have led to the repeated actions⁽⁶⁾.

Even in several big countries such as USA, the complexity of sexual violence problem is known as a condition where gender and sexuality intersect with racial and class-based oppression systems in society. Several cases of sexual violence indicate that perpetrators of sexual violence tend to be committed by victims of sexual violence during their adulthood, which is caused by past trauma and depression experienced by victims⁽⁷⁾. This is also expressed by⁽⁸⁾ in his study which revealed that 31% in America were victims of sexual violence during their childhood. This indicated that the existing justice system still unable to guarantee justice for victims, and most importantly victims recovery.

In Indonesia criminal procedural law regulates the formal procedures that must be followed in criminal case, including the crime of sexual violence. However, practically, the system is often used as a repressive tool for law enforcers. The adage of "*fiat justitia ruat caelum*" seems to be implemented in a narrow frame of mind on the pretext of law enforcement and certainty. It can be said that what is meant as a tangible form of law enforcement is the imposition of penalties or sanctions.

Bagir Manan, in his view, stated that law enforcement in Indonesia can be considered as failed to achieve the indicated objectives of law. Thus, it needs law enforcement within the socio-cultural approach and not only formalistic/legalistic approach since every legal norm presupposes some kind of normativity a normative approach. In various countries, dissatisfaction and frustration with formal justice system has regenerated interest in preserving and strengthening customary law as an alternative to prevent a crime and social disruption. The concept of restorative justice is an alternative system in law enforcement. The concept was based on belief that the conflicted parties must be actively involved in resolving and reducing negative consequences.

The existence of restorative justice in Indonesian criminal justice system in Indonesia already exists for a long time. However, the implementation of restorative justice concept, especially in sexual violence, actually creates a new problem. Particularly, criminal justice system continues to operate against the backdrop of sex-based stereotypes and the "rape myths" that are pervasive in our society. One of these beliefs is that "rough sex" is an accepted cultural practice or that some women enjoy it⁽⁹⁾. In fact, it is not uncommon in marriage is

an option in solving acts of sexual violence on the pretext of providing justice for victims. This is especially when perpetrator is still the closest person or a community leader. In cases of sexual assault, if there is no agreement, every acts of violence can certainly occur when the victim is threatened. Marriage is not a form of settlement in the concept of restorative justice, because it clearly ignores the interests and roles of victims. It is necessary to modernize the criminal justice system to ensure that every victim of sexual violence is treated with the same compassion and respect. Efforts are needed to suppress recidivists and help to change the social and cultural conditions that promote violence. Then the application of concept of restorative justice in solving cases of sexual violence.

Based on the description above, the purpose of this paper is to explain how the concept of restorative justice can be applied to solve the cases of sexual violence due to the interests of victims, where in it process, it should be able to provide justice for victims based on the interests of victim recovery. Qualitative methods are used in this research by using a qualitative method approach within the normative juridical approach (legal research) and juridical empirical as a support for Normative approach. Juridical empirical approach in this study is an approach of applicable laws and regulations both nationally and internationally and based on primary data that directly obtained, while normative approach is an approach that is carried out by examining library materials or secondary data on legal principles, legal systematics, legal comparisons and case studies which in other words are often referred to as literature law research⁽¹⁰⁾.

II. Discussion

Global Restorative Justice Paradigm

Restorative justice practices are currently interest of modern politicians, where policies and practices are being reformed using restorative justice paradigm. The term restorative justice itself was introduced in literature and practice of modern criminal justice in 1970. The 1970s seemed to be the decade that criminologists around the world began to think about the missing part in the criminal justice system. Randy^{(11),(12),(13)} were the first to talk about crises in criminal justice system, regarding the alternative paradigms that can fundamentally replace the punishment paradigm, who claim that criminal justice system ignores the interests of victims. In 1990 Restoration justice was expanded to include the people that also care for the families, friends of victims, and perpetrators participate in collaborative processes. This new focus on recovery and associated empowerment of those affected by crime appears to have great potential to increase social cohesion in severed society. It seems clear that restorative justice is a collaborative process that involves those most directly affected by crime, which

ment Has Exposed Inequalities in the Legal System That Disadvantage Women. Restorative Justice Could Help in Certain Sexual Violence Cases," policy options, 2018.

⁽¹⁰⁾ Zainudin Ali (2010).

⁽¹¹⁾ Yantzi (1998).

⁽¹²⁾ Barnett (1977).

⁽¹³⁾ Christie (1977).

⁽⁵⁾ Sarong (2019).

⁽⁶⁾ Susila (2019).

⁽⁷⁾ Probosiwi, Bahransyaf (2015).

⁽⁸⁾ Faulkner

⁽⁹⁾ Daniel Del Gobbo and Vathsala Illesinghe, "The #MeToo Move-

called as “key stakeholders”, in determining the best way to repair the damage caused by the offense⁽¹⁴⁾.

In its development, there has not been a conception of restorative justice that could satisfy every party, because there are many practices of implementing restorative justice in various countries within every variation, and ideas related to restore the justice continue to develop. Several experts formulated the concepts that are often used as reference in restorative justice approach, include,⁽¹⁵⁾ and ⁽¹⁶⁾, ⁽¹⁷⁾, ⁽¹⁸⁾, ⁽¹⁹⁾. British criminologist stated that “Restorative Justice is a process where all the parties with a stake in a particular offence were gathered to resolve collectively how to deal with the aftermath of the offence and its implication for future”⁽²⁰⁾. In this view, restorative justice is an approach to resolve violations where in it process, the parties with an interest in a particular violation gathers in a place to resolve the problems collectively for the common interest and the future.

As a legal system, restorative justice aims to restore the welfare of victims, perpetrators and societies that damaged by crime and prevent further violations or crimes⁽²¹⁾. Principally, there are three main concepts in restorative justice. First, crime is seen as the main conflict between individuals that causes suffering to the victim, society and the perpetrator himself. In this case, violations against the state are not seen as the main thing. Second, the aim of criminal justice process should be aimed at creating peace in society by reconciling the parties and correcting the suffering caused by the conflicted subject. Finally, the criminal justice process must be able to facilitate the active participation of victims, perpetrators and the society to find any solutions to solve the conflicts⁽²²⁾.

This is in accordance with the three basic principles of restorative justice as stated by⁽²³⁾. First, restorative justice emphasizes in the principle of improvement. Justice should be able to recover the victims, perpetrators, and society who were injured or harmed as a result of the occurred violations. Second, justice restoration emphasizes on the active participation of stakeholders. Handling conflicts, disputes or violations cooperatively and constructively as early as possible in the judicial process must involve victims, perpetrators and the community. The third principle emphasizes on the transformation in the roles and relations of society and government. Through the restorative justice approach, it must be able to rebuild the roles and responsibilities of government and society in promoting justice, the government is responsible for public order to create a peace.

Referring to this, it is clear that restorative justice movement began as an attempt to rebuild the unfulfilled needs in ordi-

nary judicial processes. Restorative justice expands on the circle of stakeholders or parties involved in cases where it is not only the government and perpetrators but also includes victims and members of public. Restorative justice is a response to the operation of justice system which places the parties in an unbalanced position and has an impact on the creation of injustice. In the current criminal justice system, there is an assumption that the rights of parties have been took by the state as the sole of monolithic authority in the settlement of criminal cases. Therefore, until now criminal law still exists as a means of social control, the idea of restorative justice is increasingly developing and applied by various countries⁽²⁴⁾, ⁽²⁵⁾.

Restoration of justice in the context of Criminal Law in Indonesia

Criminal justice system in Indonesia adheres to retributive justice system that inseparable from Law Number 8/1981 concerning on Criminal Procedure Law, which in its implementation refers to formal law. Under the regulations, law enforcement powers are exercised by the police, prosecutors and courts at every level. These legal institutions have the authority to carry out the criminal justice process, from the investigation stage to the verdict stage in court. Related to the criminal justice system, it cannot be separated from the criminal procedural of law. Both have a close relation to the legal system in country force. This is normal because criminal justice system is one of the sub-systems on national legal system as a whole adopted by a country. Therefore, every country in the world has a criminal justice system which is almost same but has its own character which adapted to the social, cultural and political conditions adopted⁽²⁶⁾.

In the practice of justice system in Indonesia, the concept of the purpose of punishment has developed, starting from retribution as a form of absolute counterfeiting against criminals, without seeing further impacts and benefits. Furthermore, there is a restrain concept within the aim of alienating criminals from society, to ensure a sense of security for community. There is also a concept of deterrence, within the aim of providing a deterrent effect on perpetrators and as an example for society not to take similar actions. Next development is the concept of reformation (rehabilitation) as a form of punishment within the aim of correcting the perpetrator. In this context, the concrete form of law enforcement is in the form of imposing penalties or sanctions based on the existing regulations⁽²⁷⁾, regardless the impact and benefits made for victims, perpetrators, and society.

In the development of criminal justice system, Bagir Manan views that law enforcement in Indonesia is considered to have failed in achieving the goals of law or termed “communis opinio doctorum”. Therefore, it is necessary to introduce an alternative approach based on socio-cultural and normative; it can be carried out through the system of restorative justice. Restorative justice aims to empower victims, perpetrators, families, and the community to correct illegal act by awareness and

⁽¹⁴⁾ Eglash (1977).

⁽¹⁵⁾ Paul Mccold and Ted Wachtel (2003).

⁽¹⁶⁾ Bazemore, McLeod

⁽¹⁷⁾ Sullivan

⁽¹⁸⁾ Bazemore, McLeod (2002).

⁽¹⁹⁾ Sullivan (2006).

⁽²⁰⁾ Patrick Gerkin et al., “Implementing Restorative Justice Under the Retributive Paradigm,” SAGE Open 7, no. 1 (January 2017): 215824401769156, <https://doi.org/10.1177/2158244017691562>.

⁽²¹⁾ Liebmann (2007).

⁽²²⁾ Sullivan (2006).

⁽²³⁾ Bazemore, McLeod

⁽²⁴⁾ Braithwaite (2002).

⁽²⁵⁾ Zulfa (2009).

⁽²⁶⁾ Atmasasmita (2010).

⁽²⁷⁾ Arief, Ambarsari (2018).

conviction as a basis to improve social life⁽²⁸⁾.

Justice is no longer measured as the amount of retribution from the victim to perpetrator, physically and psychologically, but the results of crime can be cured by providing support to the victim, and punish the perpetrator, either with the help of his family or the societies if necessary. In this case, it is clear that restorative justice is intended for a fair settlement within the active involvement of victims, perpetrators, families, and other parties related to the criminal act, and emphasizes efforts to restore the original state. Law is placed as progressive law aimed at humans and not the other way around. Law is not an absolute and final institution, but as a moral, conscientious institution and largely determined by its ability to serve humans. Law is an institution that aims to lead people to a just, prosperous life and build happiness for human. Humanity and justice are the goals of every legal life. This is in line with the objectives of Indonesian state which stated inside Pancasila state, to create a justice and prosperous society.

The position of restorative justice in Indonesia is clearly regulated in various laws and regulations such as the 1945 Constitution of the Republic of Indonesia; Law Number 48 of 2009 concerning Judicial Power, Law Number 14 of 1985 as amended by Law Number 5 of 2004 as lastly amended by Law Number 3 of 2009 concerning the Supreme Court. Given that the Supreme Court (MA) is a state institution that exercises judicial power and is the top of the judiciary, so it should be if the Supreme Court (MA) adopts or adopts and implements the approach or concept to restorative justice. In addition, the Law on Judicial Power, namely the Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power, specifically Article 5 clearly states that judges are obliged to explore the values that live in society (the living law or local wisdom). In this context, judges are obliged to apply a restorative justice approach in resolving conflicts and law enforcement based on the values contained in Pancasila, by prioritizing the principles or values of morals, religions and beliefs of the Indonesian nation.

The definition of restorative justice itself can be found in Law Number 11 of 2012 concerning the Criminal Justice System for Children in Article 1 states that "Restorative Justice is the settlement of criminal cases by involving the perpetrator, the victim, the family of the perpetrator / victim, and other related parties to work together the same as seeking a just solution by emphasizing restoration to its original state, and not retaliation". In handling violations of the law on the age of children must be based on a welfare approach. This is based on the consideration that children are deemed not to fully understand the wrongs that have been made, therefore it is appropriate to reduce the punishment, and differentiation of punishment for children and adults. Another factor that is taken into consideration is children are believed to be easier to nurture and bring a life than adults. Even though in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, Article 7, there is a requirement that diversion can only be carried out on children who are threatened with imprisonment under 7 (seven) years, and not a repetition of criminal act (recidivism). However, this is a real step towards solving cases through other

alternatives to minimize the case court handling, and a form of protection not only for the victim, but also for the perpetrator and community⁽²⁹⁾.

As previously stated, the fundamental value contained in the principle of restorative justice is the balance of justice, and the absence of domination between one parties to another, and on the other hand, there is no discrimination with the criminal case settlement system. Besides, the basic value contained in this restorative process is carried out through a collaborative process that involves all parties (stakeholders). This value, which tends to be exactly the same as the principle of mediation contained in civil disputes as stipulated in Perma No. 1 of 2016. This is different from a criminal act. In principle, a criminal case is a complaint offense, so if the complainant withdraws his complaint, the legal process can be terminated. However, this is different from the usual complaint offense, where the case can be processed without the consent/report of the victim (victim). However, it should be noted that the settlement of criminal cases can still be carried out in a family manner or based on restorative justice based on the following provisions: Prosecutor's Regulation Number 15 of 2020 concerning Cessation of Prosecution Based on Restorative Justice ("Perkejaksaan 15/2020"); Regulation of the Head of the National Police of the Republic of Indonesia Number 6 of 2019 concerning Criminal Investigation ("Perkapolri 6/2019"); and Circular of the Chief of the National Police of the Republic of Indonesia Number SE/8/VII/2018 of 2018 concerning the Application of Restorative Justice in the Resolution of Criminal Cases ("SE Kapolri 8/2018").

The principle of restorative justice cannot be interpreted as a method of terminating a case peacefully, but is broader in fulfilling a sense of justice for all parties involved in a criminal case through efforts involving victims, perpetrators and the local community as well as investigators/investigators as mediators, while case settlement is one of them in In the form of a peace agreement and revocation of the right to sue from the victim, it is necessary to request a judge through the public prosecutor to abort the authority to prosecute from the victim and the public prosecutor. In other words, the application of restorative justice in criminal justice process can be done through several stages or processes that must be passed for justice seekers at the level of investigation, prosecution, examination in court to the stage of judge's decision.

Sexual Violence in the Justice Restoration

Sexual crime consists of all sexual acts, attempted sexual acts, unwanted comments, sex trafficking, using force, threats, physical coercion by anyone regardless the relationship with the victim, under any circumstances⁽³⁰⁾. Sexual crimes can take many forms including rape, sexual slavery and/or sex trafficking, forced pregnancy, sexual violence, sexual exploitation and/or sexual abuse and abortion⁽³¹⁾. Not all types of violence can be identified as having subjective and objective elements as required in the criminalization of criminal law, therefore the types of sexual violence which are practices, traditions and pol-

⁽²⁸⁾ Nikmah Rosidah (2014).

⁽²⁹⁾ Sianturi (2016).

⁽³⁰⁾ IASC (2005).

⁽³¹⁾ Hawari (2011).

icies, do not have to be resolved by criminal regulations (for example sexual violence in the form of harmful sexual practices or traditions discriminating against women and sexual control, including through discriminatory rules based on morality and religion). For this reason, sexual violence also needs to be intervened by changing perspectives and mindsets through education and information dissemination. This is especially education and information about how to do gender justice without discriminating against women, improving cultural practices in society that still harm women.

Referring to the book “KUHP and its Comments”⁽³²⁾, the term sexual violence is included in the category of obscene acts, which are described as acts that violate the sense of decency, or other heinous acts, and all in an environment of sexual lust, for example, kissing, groping the organ of genitals and the breasts and others. Obscene acts in the Criminal Code are regulated in Book Two on Crimes, Chapter XIV on Crimes of Decency (Articles 281 to 303). For example, obscene acts committed by a married man or woman (Article 284), rape (Article 285), or inducing immorality to an immature person (Article 293). Furthermore, Soesilo explained that the term “obscene act” refers to Article 289 of Criminal Code, “Whoever with violence or threats of violence force someone to commit or allow committing obscene acts, is punished for committing an act that attacks the honour of decency with a sentence of perpetuity for nine years”. Thus, an important element of sexual harassment is the presence of unwillingness or resistance to any form of sexual attention. It could be actions such as whistles, words, comments which according to local culture or courtesy (sense of morality) are normal; however, if that makes the subject uncomfortable, those acts can be categorized as sexual harassment.

According to the annual records of National Commission on Violence against Women (Komnas Perempuan), in 2017 there were 348,446 cases of violence against women, 26% or 3,528 of which occurred in public spaces. Data obtained by Komnas Perempuan based on a questionnaire, shows an increase in cases of violence against women by 25% compared to 2016. Cases of violence against women in public spaces were recorded in 2017, there were 2,657 cases of sexual violence consist of sexual abuse (911 cases), sexual harassment (704 cases), rape (699 cases) and sexual intercourse (343 cases). The development of sexual violence acts and their handling has become an indication and evidence of the weak protection of human rights, especially women from sexual violence. The act of sexual violence was placed as an example of a criminal act that violates women’s human rights because it puts the advantage on gender discrimination.

It is an indisputable reality that in handling cases of sexual violence, the interests and rights of perpetrators (suspects) are more considered in comparison with the interests and rights of the victims. Since the beginning of the investigation process, the perpetrator receives protection of his rights, obtains legal assistance, receives good treatment, informed about the suspected crime, and even has the right to ask for compensation if an error occurs in the process of criminal case. Unlike the case with the victim, apart from the pain that was felt when the

crime occurred up to the trial process, the victim also received unpleasant treatment from her environment. This condition has implications for the reluctance of victims to report the incident, or to take other solutions, although sometimes it is outside the will of their conscience⁽³³⁾. Rape incident has been discussed in term to find individual actions of “private” situations. Several rape cases that occurred in Indonesia show that rape is not necessarily actions of an individual in private space but can also be the actions of groups in public space. Refer to this matter, the resolution of sexual violence cases cannot be done automatically through the restorative justice approach. To solve the cases, sexual crimes must be observed based on criminology, victimology and ontology aspects.

In criminological perspective, sexual crimes should not refer to motives and behaviour. This is different from criminal law, which focuses on the factors that cause crime. Criminology has been shown to reveal the motives of crime perpetrators, whereas criminal law is concerned within the relationship between actions and consequences⁽³⁴⁾. The motive factor can be traced to evidence that strengthens the intention to commit a crime. In criminological review, the causes of sexual violence were done based on internal factors, the negative personality of a person or individual, and they tend to commit crimes⁽³⁵⁾.⁽³⁶⁾, stated that crime can also be triggered from external invoices, such as the condition in family, environment, and society⁽³⁷⁾ in his study also states that the external factor of sexual crimes is the role of victim in the occurrence of crime, such as appearance, situation, environmental conditions and the position of victim, which can trigger the perpetrator’s intention to commit sexual crime (rape). Various conditions and situations become motives that cause the perpetrator to take the initiative to commit sexual crimes against the victim. However, every motives and factors that trigger sexual crimes, in the perspective of criminologists, include as the main thing that determines and qualifies an act as sexual violence or not. Steven Box and J.E. Sahetapy⁽³⁸⁾ stated that a criminological act of sexual violence was done based on the absence of women consent. This is what distinguishes it from a juridical perspective, which often sees acts of sexual violence from the presence or absence of an element of violence.

Criminology sees crime from the perpetrator’s point of view; Victimology sees crime from the victim’s perspective. Victims are people who either individually or collectively have suffered losses, including physical or mental, emotional, economic or substantial harm to their fundamental rights, through acts or conditions that violate the law in each country, including the abuse of power⁽³⁹⁾. Victims are those who suffer both physically and mentally as a result of the actions of others who seek fulfilment of their own or other people’s interests that contrary to the rights of the harmed parties⁽⁴⁰⁾. In this case, vic-

⁽³²⁾ Soesilo, (1986).

⁽³³⁾ Surbakti (2010).

⁽³⁴⁾ Atmasasmita (1995).

⁽³⁵⁾ Sahetapy

⁽³⁶⁾ Sahetapy (1983).

⁽³⁷⁾ Sianturi

⁽³⁸⁾ In Weda (1996).

⁽³⁹⁾ Gosita (2014).

⁽⁴⁰⁾ Mansur, Gultom (2007).

tims of sexual crimes are people who suffer both physically and mentally because they have received the consequences of the experienced sexual violence, therefore, legally positive, the victim has the right to claim any damages or compensation to the perpetrator as part of legal protection. However, it should be emphasized that, in order to observe the problem of crime according to the actual proportions of various dimensions, it should consider the role of victims in the emergence of crime, whether the victim plays a role directly or indirectly. Whether it is consciously or unconsciously, the role of victim can stimulate any sexual crimes.⁽⁴¹⁾ Stated about “victim precipitation”, which is the role of victim in terms of position and behaviour of the victim who intentionally or unintentionally encourages the crime. Victim precipitation can be happen because of the victim clothes, where the victim is in a quiet environment and position, and the victim is alone.

Ontology, sexual crimes cannot be viewed as crimes that are only a private matter (individual victims), but should be made as public problems, because this crime is clearly a form of primitive behaviour that emphasizes lust, revenge and superiority. That is the right to sacrifice others. Sexual crimes are one of the heaviest forms of violence. In the UN Convention regarding the Elimination of Violence against Women and others, it even extends to the protection of women in household matters such as the case of “marital rape” (rape in marriage), it is not limited on women’s rights outside the home or public sector. Although in cases such as rape by husband to wife, this is not recognized in Criminal Procedure Code and considers as an object of discourse by Islamic law experts, it can be used as a measure of increasing concern for women’s rights.

According to Article 1 of Declaration on the Elimination of Violence against Women, it has been stated that violence against women is any act based on sex differences that resulted in women physically, sexually or psychologically suffers, including the threat of certain actions, coercion or arbitrary deprivation of liberty - authority, whether occurring in public or in private life. It is very clear that women should be kept away from acts that involve abuse, deprivation of their rights and desecration of human dignity, therefore sexual crimes are one of the evil and heinous acts which in addition violate human rights and also cause physical, social and psychological suffering to women. Human rights are violated continuously, even after the mistakes were done. The victim does not receive humane treatment, but is treated the opposite, being positioned as an object such as an object that cannot be used or placed on an equal level in humanitarian level.

Referring to these conditions, this is where society plays a role in assisting victims of sexual crimes. As a crime that cannot be viewed as a private crime, of course, law enforcement in cases of sexual crimes cannot necessarily be carried out only as a restorative justice approach. In the articles of Criminal Code concerning on decency, not all cases of sexual crimes are included in the offense of complaint. To be able to find out whether an arrangement regarding a criminal act is a complaint offense or an ordinary offense, it has to carefully look at the construction of governing article. Based on the provisions in the formulation of Article 76D and Article 76E of Law

35/2014 concerning on Amendments to Law Number 23 of 2002 concerning on Child Protection, and Article 81 and Article 82 of 1/2016 concerning on the Second Amendment to Law Number 23 of 2002 concerning Protection Children, it appears that there is no obligation for the offense to be reported by the victim. Thus, the offense of intercourse with a child and fornication of child is an offense, not a complaint offense.

Ordinary crimes can be processed without the consent of the harmed person (victim). Generally, sexual crimes constituting offenses for complaints that can be prosecuted if there is a report from the victim, criminal sanctions are the last ultimatum remedium; if the reconciliation was achieved, the case would be withdrawn. The reconciliation referred to here can be in form of an agreement between the perpetrator and the victim resolve disputes through marriage, within the various considerations such as norms, pregnancy, etc., to prevent further crimes. Reconciliation is a form of restorative justice approach, which is based on the agreement of all parties, victims, perpetrators, families or communities, without any coercion, threats or pressure from other parties. Justice for sexual crimes should take into account the best interests of victim. Principally, the best restorative justice approach for sexual crimes is to provide protection and assistance to victims, to prevent victims from psychological impacts that will be received during the trial process and when they return to society. This is where the participation of all parties is not only the family, but also the society and law enforcers to provide any protection and assistance to victims.

III. Conclusion

Sexual crimes are crimes that cannot be categorized as private crimes, because they violate human rights. In enforcing cases of sexual crimes, it must be seen from the perspective of criminology (based on the perspective of the perpetrator), victimology (based on the perspective of the victim), and ontology (based on the substance of the sexual crime act itself). It is important to position the problem objectively, which provides justice for both the perpetrator and the victim. Sexual offenses are general offenses for complaints which can be processed when there is a complaint from the victim, except for sexual crimes against children, because they view children as persons who are not legally competent. Complaint offense enables case resolution through reconciliation as a form of law enforcement within the restorative justice approach. However, what should be noted here is that the restorative justice approach cannot automatically be carried out if there is no agreement between the perpetrator, victim, family or community. The active participation of all parties and the absence of compulsion must still be prioritized. The most possible step in restorative justice for sexual crimes is to provide legal protection and assistance to victims and to minimize the psychological impact received by victims, even provide a healing process from trauma caused by sexual crimes that received by victims. The role of families, law enforcement officials and the community is very important in providing protection and assistance to victims, and this is the fairest act that can be received by victims.

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